

'Terminated' Agent May Haunt U.S.

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"WE WERE JUST sitting, talking . . . The next thing I knew, the car swerved, the windshield was shattered, glass fell out; Jimmy was leaning forward, he had blood coming out of his nose and mouth, and he looked like he was dead."

Inchin Hia Lam, whose code name was "Jimmy," was indeed killed, a fact that effectively terminated his service as interpreter for a secret operation of the U.S. Special Forces (Green Berets). An official "termination" order had been issued shortly before his death, but the intended method of separation was dismissal, not execution.

Sitting beside Lam when he died on the front seat of an automobile traveling along a South Vietnamese highway was Green Beret Capt. John J. McCarthy Jr., who had been assigned to carry out the dismissal. His pistol, a snub-nosed .38-caliber Smith and Wesson, discharged at about the time that "a projectile entered the back of the head of the victim just within the hairline . . . and exited from between his lips . . ."

Capt. McCarthy said his firing was accidental and only coincidental with Lam's death. An Army medical examiner testified at McCarthy's court-martial that the projectile which killed the victim was a .22-caliber bullet, not a .38. McCarthy nevertheless was convicted of premeditated murder.

The incident could have come from the imagination of a Graham Greene or a John Le Carre. But it really took place—on Nov. 24, 1967—and it could produce international travail for the U.S. government if McCarthy's defense attorneys succeed in convincing the Army's Court of Military Review that their client should have had an open trial before a civilian court.

Capt. McCarthy, 27 and the father of three, is free pending appeal from what originally was a life sentence at hard labor but since has been reduced to 20 years.

While comparatively obscure, the McCarthy case carries a larger potential for international complications than the celebrated Green Beret case last year, in which Special Forces Col. Robert B. Rheault and seven co-defendants were accused of murdering a South Vietnamese who was a suspected double agent.

To avoid exposure of Central Intelligence Agency operations, the

of national security, the Nixon administration dropped prosecution of Rheault and his subordinates. McCarthy's attorneys have proposed the same remedy as an alternative to the public retrial they seek.

But the Rheault case never reached court, and the McCarthy case already has. Despite censorship of the record, it provides a rare public glimpse of clandestine U.S. operations in Southeast Asia.

What makes the McCarthy case more prickly from an intelligence-diplomatic standpoint for the United States is the fact that Lam was a Cambodian, not a South Vietnamese. Lam also was a member of the Khmer Serai (Free Cambodia), a small, now-disorganized secret society that aspired to overthrow the Cambodian government of Prince Norodom Sihanouk.

Lam had worked for the Green Berets from about 1965. When he was slain, he was working for a clandestine mission code-named "Project Cherry," headed by Capt. McCarthy. The captain's public assignment was Detachment B-57, Fifth Special Forces Group. (The same detachment was involved in the Rheault case.)

Whether Lam was hired just because he was a Cambodian or whether the fact that he was a Khmer Serai had a bearing is not ascertainable from the heavily censored version of the trial record which, after considerable prodding, the press can inspect.

Exactly what mission Project Cherry performed also is blanked out on that record, with empty pages marked "secret" or "confidential," and elliptical references to such cloak-and-dagger accoutrements as "safe houses"—secret quarters maintained by intelligence agencies as presumably free from surveillance.

It is common knowledge in South Vietnam, however, that members of the Cambodian minority (estimated at three-quarters of a million to a million people) are employed by the Americans and the South Vietnamese for open and secret work in the war.

The work includes obtaining information about Vietcong and North Vietnamese forces who operate from a "sanctuary" across the border in Cambodia.

The Khmer Serai has long experience in penetrating that border. This secret organization has disintegrated considerably in the last two years, especially since some of its forces openly swung over to support Prince Sihanouk's government. But according to U.S. sources, the Khmer Serai leader, Sihanouk remains on even more cordial terms with both North Vietnam and the Vietcong. But he now concedes

The Khmer Serai is characterized as usually having operated from an opportunistic position to the right of Sihanouk, although its leader is said to have cooperated with the Communist-led Vietminh before 1954, when Cambodia was still part of French Indochina. The more important opposition to Prince Sihanouk in Cambodia is the Khmer Rouge (Cambodian Reds), who cooperate with Communist Vietnamese forces.

Sihanouk's Charges

BEFORE THE Khmer Serai fragmented, Prince Sihanouk repeatedly charged that the American CIA was colluding with the Khmer Serai, Thailand, South Vietnam and other "enemies" of his regime.

A typical Sihanouk charge came in 1967, the year of Lam's "termination": "The Khmer Serai, Americans, Vietnamese, Thai and South Koreans have joined forces in attacking us . . ." Another: "The Central Intelligence Agency has been able to bribe . . . two high-ranking officers of the Khmer (Cambodian) Armed Forces who have considerable deposits in a Swiss bank" for "starting a coup d'etat against Sihanouk . . ."

A State Department spokesman issued a denial last month that was prefaced by the Lam-told formulation often employed in refuting allegations concerning CIA activities: "I'm informed that the U.S. Government has never assisted or cooperated with the Khmer Serai movement."

In the early 1960s, Prince Sihanouk's relations with the United States were strained to near-breaking point over his allegations against the CIA. He invoked those charges as justification for rejecting U.S. aid. Then, in 1965, Cambodia broke diplomatic relations, primarily on grounds that U.S. forces were violating the Cambodian-South Vietnamese border.

In that period, Sihanouk, who balances precariously between East and West to preserve his neutral nation, expected the Vietnamese Communists to win the war in South Vietnam—which they were doing. When the tide of war shifted, so did Sihanouk, openly declaring he was "caught between the hammer and the anvil." Last summer, the United States succeeded in re-establishing diplomatic relations with Cambodia.

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that Vietnamese "sometimes" take sanctuary across his border against his will to prevent it. Both U.S. and South Vietnamese troops sometimes pursue them there; when Cambodians are killed in the process, 'Sihanouk protests, and he often obtains "sympathetic" U.S. compensation for "unintentional" border violations.

The situation remains a delicate one for both the United States and Cambodia. That is where Capt. McCarthy's current appeal comes in.

Request Draws a Blank

McCarthy's APPEAL is being handled principally by two attorneys, Capt. Stewart P. Davis of the Army's Judge Advocate General's office and civilian lawyer Charles Morgan Jr., the resourceful director of the American Civil Liberties Union's Southern regional office in Atlanta.

Their pending motions run the full legal range from constitutional claims of denial of due process to alleged trial error. They also attempt to maximize a defense contention that Lam might have been killed by the Khmer Serai.

The defense suggests that a Khmer Serai agent may have fired a simultaneous shot, just when Capt. McCarthy's pistol fired. This element was first raised in McCarthy's court-martial with second-hand testimony that the society "ordered him (Lam) killed" because "they felt that he was a Russian spy, coming through Cambodia, spying on the Khmer Serai for the Cambodian government."

That information reportedly was given by a "high priest" of the Khmer Serai to two members of the Green Berets when they turned Lam's body over to the sect. The body was delivered to a Khmer Serai pagoda in South Vietnam, an American sergeant testified, because there was concern in Capt. McCarthy's unit that the Khmer Serai "would try to retaliate against Operation Cherry" because of Lam's death.

The sergeant testified that on receiving the body, the Khmer Serai priest also asked compensation for Lam's death. Then "a price was agreed on" and the body delivered to the pagoda, the sergeant said.

It was during that conversation, the witness said, that the Americans were told that the Khmer Serai itself had "marked him (Lam) for death" because it concluded he was a double agent.

"You cannot dismiss this possibility," McCarthy's defense said at his court-martial at Longbinh, South Vietnam, on Jan. 29-30, 1968. But the defense did not put extraordinary weight at the time on the likelihood that the Khmer Serai had "marked" Lam in a moving automobile

added: "However, it probably seems more probable that this was just a lucky shot from a sniper" on the Communist side of the Vietnamese war, which "by chance . . . hit a man's head."

Since the court-martial, the defense has concentrated more on the Khmer Serai angle, weighing in with a demand for the production of "two foreign nationals" as new witnesses—one presumably being the "high priest"—and a demand to locate a missing fragment of a bullet with "a tiny particle of quartz" stuck to it, according to an FBI report. The defense raises the claim that the bullet fragment that hit Lam, and the quartz, could show that the fatal shot came from outside the car, through its shattered windshield.

The prosecution calls this claim for new witnesses and a new trial totally unjustified, saying it "suggests" a "calculated plan to create a smokescreen."

The CIA Role

ANY REOPENING of the case at a public trial, with the Khmer Serai issue imbedded in it, obviously could complicate U.S.-Cambodian relations and bedevil the CIA.

That is why the defense adroitly suggests to Secretary of the Army Stanley R. Resor: "This appellant is entitled to the same relief granted others when any agency of the federal government 'has determined that in the interest of national security it will not make available any of its personnel as witnesses . . .'" The quoted language is from the announcement of the decision not to bring the Rheault case to trial.

Direct references to the CIA are deleted from publicly available copies of the McCarthy case record (his attorneys have the full case report). Public briefs in the case state ambiguously that "the appellant was under the direct control of a civilian agency of the U.S. government . . ."

There is one exchange of documents in the court record, however, between defense attorneys and the CIA.

The defense asked the CIA to supply it with all CIA records dealing with "Project Cherry, Inchin Hia Lam (code name Jimmy)," and Capt. McCarthy between November, 1967, and February, 1968, from CIA agents or offices in South Vietnam, Thailand or Cambodia.

Back came a reply signed by Lawrence R. Houston, CIA general counsel, stating that a search of the records failed to disclose any reports "originating from the agents or offices" mentioned. There is no further explanation of that exchange.

A Murder Mystery

A PART FROM the international implications in the McCarthy case, it is a full-fledged murder mystery story

in its own right. It also has been a fundamental challenge to the Army's system of military justice.

McCarthy, who had an exemplary military career, enlisted in the Army on Jan. 25, 1960, and was promoted from the ranks of the Special Forces. He was serving his second tour of volunteer duty in South Vietnam when Lam was killed.

Project Cherry, which McCarthy commanded, used "ethnic Cambodians," the captain testified.

Lam, or Jimmy, McCarthy said, "spoke several languages — Chinese, Vietnamese, Cambodian and English—quite well." Lam, he said, also "held a rank in the organization known as Khmer Serai," which McCarthy described as "an organization which plans the political overthrow of the Cambodian government in the future."

Before McCarthy took command of Project Cherry, he said, suspicions had arisen about Lam's security. Some incriminating documents were found in his belongings, but "evidently there wasn't enough in them to take action against Jimmy," McCarthy testified.

Project Cherry came to an end. The Cambodian agents were debriefed and given a bonus of three months' pay, and attempts were made to find them other employment. Other testimony showed that attempts were made to find Lam employment "with another United States agency, employed basically in the same type of operations that we ran," but Lam's application was "turned down."

McCarthy's superior, a major, said the only course left was to turn Lam "out on the street, pay him separation pay, and bid him farewell."

On the night of Nov. 23, 1967, there was a "Thanksgiving Day" party, with some drinking, for McCarthy and his men. They occupied a "safe house," away from unit headquarters in a downtown Saigon hotel. Master Sgt. Glenn F. Rutherford told the court-martial that in the early morning hours of Nov. 24, McCarthy came to his room and said, as Rutherford paraphrased it, "Jimmy knew too much and he had to go" or "Jimmy knew too much, he had to die."

McCarthy said he had no recollection of saying anything like that. He said he told Rutherford, "We'll get rid of him today." Asked what he meant by that, McCarthy said, "terminate Jimmy's employment with us, disassociate him." But first, McCarthy testified, he wanted to question the interpreter.

"If Jimmy gave me any indication that he had passed on information, or had been relaying our activities to unauthorized sources," McCarthy testified, "then I would have placed him otherwise," said McCarthy, "I would have dropped him off."

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Sgt. Rutherford did company McCarthy. Another sergeant did: Thomas A. Jones III, who drove the car, a four-door Japanese-built Datsun. Lam, "bag and baggage," got in, between Jones and McCarthy. "Jimmy was relaxed," said McCarthy; the captain told him he was being taken "to meet his new employer."

A Hair-Trigger .38

THE AUTOMOBILE headed out of Saigon, on highway No. 1, toward Hongoctao.

"I was just talking to Jimmy," said McCarthy, "hoping that he would come up with something, and I told him that he had done a real fine job for us; we really appreciated his efforts. I stated that if he couldn't get a job, he could always go back to Cambodia and sell Volkswagens, which he had been employed in sometime in the past..."

"He laughed, thought it quite funny. Then there was a loud explosion."

The time was about 5 a.m., just outside of Hongoctao, as the car was crossing a small bridge.

McCarthy said he was stunned and unsure what had happened. Several things happened almost simultaneously. McCarthy's pistol fired. The windshield shattered, and Lam slumped over with "blood coming out of his nose and mouth, and he looked like he was dead." He was either dead or dying.

Jones, the driver, said of the explosion he heard, "as loud as it was, I'd say it was a .38." Jones was armed with a 9 mm. Browning pistol. He testified he did not see McCarthy's .38 until it was fired. "I noticed the windshield shattered," said Jones, "but I did not see any holes, sir."

McCarthy, who is left-handed, testified he had his .38 in his left hand. His left arm was across the back of the front seat, with the pistol out of sight. According to the testimony, McCarthy's service pistol had a hair-trigger, with the sear filed down, though he allegedly was unaware of that, and it also was cocked. "My weapon went off," he testified.

Q. Did you see where the bullet went?

A. No, I didn't notice.

Q. How did the weapon happen to go off at this time?

A. That's what I don't know...

Q. Was this weapon at any time pointed in the direction of the deceased?

A. No, it was not...

Q. Your weapon was in no way directed toward the windshield?

A. It may have ricocheted, I didn't notice.

Jones testified that the car swerved when the explosion occurred, and he was occupied with regaining control. Then he saw Jimmy slumped over beside him.

Q. Did you notice the captain at this time?

Q. Did you notice where his arm was?

A. His arm was in back of the seat, sir.

Q. Did you notice any expression on his face?

A. I thought I saw him smiling, sir.

Jones, questioned again, was asked if he was "sure" the captain was smiling. He replied, "at that moment, sir, I could not be sure."

McCarthy acted as if "he was in a state of shock," said Jones; "he said, 'we've got to hide the body.'" They drove back to the Special Forces unit to get help in disposing of the body. They were joined by Sgt. William Gordon. In the court-martial, Jones was asked:

Q. What was wrong with going back and turning this over to the military police?

A. Due to the nature of our work, sir, it would have been impossible.

Q. So there was a necessity to get rid of the body?

A. Yes sir, most definitely was a necessity.

Jones also testified that it was also customary for men in the unit, while in an automobile, to have their pistols "on the seat beside us" for instant use.

After the shooting of Lam, because the Datsun's windshield was "frosted into honeycomb cracks," it was knocked out by the occupants, they said, to provide driving vision. That eliminated one critical piece of evidence.

Placed in a Ditch

LAM'S BODY was taken to the rear of the Green Beret compound for burial, but the ground was "too hard" for a grave to be dug. Instead, the body was stripped of clothing and placed in a ditch covered with bushes.

McCarthy went back to his room; Jones went to report the affair to McCarthy's superiors. When asked if McCarthy gave him any indication that the incident should not be reported, Jones replied, "No sir, he didn't."

The result was that charges were placed against McCarthy for premeditated murder, charges on which he was convicted.

The defense contends that the only evidential connection between Lam's death and McCarthy's culpability is testimony of an Army pathologist, which the defense strongly disputes.

Capt. Richard T. Mason, the pathologist, found "no visible cartridge discharge residue on the skin around the bullet perforation." But with a test procedure, he found "the presence of invisible traces of powder residue in the wound..." The small size of the wound convinced the pathologist that Lam could not have been killed with a .38, but was slain with a .22- or .25-caliber.

...onion that the wound was "a contact wound"—meaning it came from a weapon held to the victim's head. The military court accepted that conclusion.

Where did a .22-caliber weapon come from?

"Other weapons were available to team members," a prosecution appeal brief states. The Army court that convicted McCarthy, it adds, "could easily infer that the weapon, fired into Inchin Hia Lam's head, not far from the sergeant-driver's ear (creating the very loud sound he heard) was disposed of with a single flick of the wrist, out the window" (all windows were said to be open) "and that the .38-caliber weapon was only produced later to establish a cover for the shot heard..."

The defense assails, and the prosecution supports, the validity of the pathologist's tests.

The possibility that Lam was slain by a .22-caliber weapon "cannot be established or disproved," the defense contends.

For McCarthy to have shot Lam with his .38 without leaving visible "powder tattooing or flash burns" on the victim, the defense maintains, would have required the shot to have been fired "at a distance greater than three feet from the deceased..."

"Whether the cause of the discharge (of McCarthy's hair-trigger .38) was a bump in the road or an involuntary movement of the appellant, the evidence clearly indicates that no one in the car, least of all the appellant, expected the shot or shots..."

McCarthy had no motive to shoot Lam, the defense argues, except for the words of Sgt. Rutherford that McCarthy said Lam "had to die," which McCarthy denies using.

"The evidence clearly shows," the defense contends, "that the appellant could not have shot the deceased, but if he did, it was the result of an accidental discharge of a defective weapon." More probably, the defense says, the fatal shot came from outside the car, either from a Khmer Serai agent or from a stray shot in the sporadic shooting that occurs in the area through which the car was moving.

Constitutional Issues

THE broad constitutional issues raised by the defense include the denial of the right to a public trial, in violation of the Fifth and Sixth Amendments, and a demand for trial in a civilian court because McCarthy was working under "direct control of a civilian agency... without any service connection except his clandestine status as a member of the armed forces."

McCarthy, the defense adds, was "suddenly thrust into the world of spies and double agents without the benefit of special training."

The prosecution argued that McCarthy "waived" objections to excluding the public from portions of his court-martial; that the prosecution's original case was presented "in open court"; that the defense case required closing the court for security reasons, and that the crime was clearly "service connected" and committed "in a U.S. government vehicle."

"The Supreme Court," the prosecution's appeal briefs say, "has long recognized the specialized needs of the military judicial system . . ."

McCarthy's action, the prosecution says, "was unsanctioned by his government and its laws. Even war has its rules."

"No battle was raging. The victim was in his control and not a combatant . . ." McCarthy's "unlawful act required imposition of disciplinary sanctions to assure that he, and others similarly situated, would thereafter 'play by the book.' To ignore the killing was to invite chaos."

The test of the rules, the game and the players continues in the nearby Virginia quarters of the Army's Court of Military Review.